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ELECTRONIC MEMORANDUM

TO: Jill Goldsmith, Town Manager
FROM: Jay Talerman, Town Counsel
RE: Opinion - Annual Town Meeting - Petitioned Articles
DATE: March 31, 2014

Jill:

You have requested my opinion with respect to the petitioned articles. While each such petition is properly on the warrant, it is my opinion that several of them have legal flaws. My opinions are listed below. As you can see, the opinions do not contain a significant amount of detail. However, if you so desire, I can expand upon any such opinion.

Article 37 - Release from the membership of the Cape Cod Commission

This article seeks to direct the Selectmen to place, on the ballot, a question on whether or not the Town shall petition for a Special Act to have the Town removed from the Cape Commission. While this matter may properly appear on the warrant, a favorable vote would not operate to automatically place the matter on the ballot. For matters such as this, the Selectmen have sole authority to place matters on the ballot. While the Selectmen may place the question on the ballot, they would not be required to do so.

Article 38 - Ryder's Cove Conservation Restriction

Subject to compliance with other statutes regarding land dispositions, this article is legal.

Article 39 - Lydia's Cove Bylaw

This article is legal although I note that it places requirements (regarding membership) that are not in place for other committees in the bylaw

Article 40 - Waterways Bylaw Amendment

This article seeks to add a bylaw that would classify the Harbormaster as a civilian position to be under the control of the Town Manager or other dept head, excepting the Police Chief. In my opinion, this Bylaw conflicts with, and is superseded by, Part V of the Charter. The Town Manager has exclusive authority under the Charter to determine the appropriate classification and supervisory dept for the Harbormaster. Accordingly, this article seeks an illegal result.

Article 41 - Bylaw re: Administrative Orders

This article attempts to provide additional requirements to the process of issuing Administrative Orders under Section 5-1(a) of the Charter. The proposed Bylaw attempts to require (a) that all Administrative Orders to be presented to the Board of Selectmen at duly posted meeting; and (b) a 90 day comment period by several committees prior to the filing of any administrative order regarding the Harbormaster. In my opinion, both components of this proposed bylaw impermissibly conflict with the Charter. As a threshold matter, the Charter gives the Selectmen absolute discretion to allow an administrative order to be approved by their inaction. Thus, the bylaw cannot compel the Selectmen to meet to discuss such a matter if they choose not to do so. Second, the requirement for a 90 day comment period prior to the filing of an administrative order interferes with the Town Manager's authority and discretion under the Charter.

Article 42 - Bylaw re: Standing Committees

This article attempts to set forth the parameters of membership for existing Standing Committees that are established under the Bylaws. In this manner, it is my opinion that it conflicts with the Charter. Particularly, Section 5-1(b) of the Charters reserves, for the Selectmen, the composition and term of the members of boards and committees. Because the Charter, trumps the bylaws, a bylaw may not usurp the Selectmen's authority in this regard. While the Town Meeting may vote to establish new committees (See §5-1(b)), it may not operate to disturb the powers of the Selectmen with respect to existing committees. Furthermore, I note that the proposed bylaw states that members of a standing committee must be reappointed (excepting term limits) unless "cause" exists for non-reappointment. In my opinion, this element of the proposed bylaw impermissibly infringes upon the Selectmen's authority and discretion on appointments after a term is concluded. While a Board member may not be *removed* except for cause, a member of the Selectmen has wide authority to make appointments of his/her own choosing at the conclusion of a term.

Article 43 - Amendment to Wetlands Bylaw

This proposed amendment would be legal

Article 44 - Amendment to Zoning Bylaws re: flooding

This proposed amendment is legal but duplicates a portion of the amendment proposed under Article 35. Thus, if Article 35 passes, this proposal will be moot.

Article 45 - Amendment to Sewer Regulations

The proposed bylaw sought under this article would principally require a town meeting vote for any amendments to sewer regulations. For historical purposes, it appears that the Town Meeting may have approved other changes to the sewer regulations. It appears that these actions may have been precipitated by an existing provision in the regulations which states "modifications, additions to or rescinding these rules and regulations may take place from time to time as authorized by a Town Meeting as required by Massachusetts General Laws, Chapter 83, Section 10." [emphasis supplied] However, nothing in the text of G.L. c 83, §10 requires a Town Meeting vote to adopt sewer

regulations. In fact, based upon available cases, it is the Sewer Commissioners that have the discretion to enact and amend regulations under §10. Thus, it would be reasonable to conclude that Town Meeting may not, despite past practice, amend sewer regulations as that power is reserved to the Sewer Commissioners. While Town Meeting does have the authority to enact bylaws regarding the public sewer (which would then require approval by the Attorney General), the petitioner here is expressly seeking to amend the regulations. Accordingly, it is my opinion that the petition may not be consistent with law, despite past practice.

Article 46 - Resolution re: Public Participation

While this petition merely seeks a non-binding resolution, I note that the second paragraph of the resolution includes language that “public participation includes the promise that the public’s contribution will influence the decision.” [emphasis supplied] While there can be no doubt that public participation influences decision-making in many instances, there is no “promise” that it will do so.

As always, call or email with any questions that you may have.

Jay